IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

ANITA S. EARLS, Plaintiff, v. NORTH CAROLINA JUDICIAL STANDARDS COMMISSION, *et al.*, Defendants.	Civil Action No. 1:23-CV-734-WO-JEP

BRIEF OF AMICI CURIAE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AND 15 OTHER CIVIL RIGHTS ORGANIZATIONS

Amici Curiae,[1] Lawyers' Committee for Civil Rights Under Law along with the National Association for the Advancement of Colored People, the North Carolina State Conference of the NAACP, the Brennan Center for Justice at NYU School of Law, the League of Women Voters, the League of Women Voters of North Carolina, The Leadership Conference on Civil and Human Rights, the National Urban League, the National Action Network—D.C. Bureau, the National Women's Law Center, the Shriver Center on Poverty Law, Equal Rights Advocates, the National Coalition on Black Civic Participation, The Joint Center for Political and Economic Studies, Advancement Project, and Planned

[1] No counsel for any party authored this brief in whole or in part. No party or party's counsel contributed money intended to fund the preparation or submission of this brief. No person or entity other than amici or their counsel made a monetary contribution for preparation or submission of this brief. The disclosure statement required by Local Rule 7.5(e) is included with the Amici's Motion.

Parenthood South Atlantic submit this brief in support of the rights of Justice Anita Earls and all jurists to speak publicly on matters concerning the efficacy of the judiciary and its capacity to render justice, including through calls for increased racial and gender diversity on the bench and for education of judges concerning the effects of implicit biases on judicial decision making.

INTRODUCTION

Judges are to be commended, not investigated, for identifying ways to improve the judiciary and strengthen public faith in its ability to render justice. Justice Anita Earls spoke constructively about the lack of diversity among appellate advocates in North Carolina and how a judge's implicit, unconscious biases can result in different experiences in court for women and people of color. Public speech on such topics, especially by members of the judiciary, facilitates the improvement of judicial decision making and bolsters the public's faith in the justice system. Yet, for her public speech, the North Carolina Judicial Standards Commission—a disciplinary body with the authority to order disciplinary hearings and recommend her for public reprimand, censure, suspension, or removal—has notified Justice Earls that it has launched an investigation into her speech for potential breach of the North Carolina Code of Judicial Conduct.

The Commission's action is wrong on a multitude of levels. First, it chills Justice Earls's speech on matters of serious public concern in violation of her First Amendment rights, as her counsel have ably demonstrated.

Second, it ignores the urgency of what Justice Earls said about strengthening and maintaining the legitimacy of the Court and deepening public faith in the judiciary. A

wealth of empirical research corroborates Justice Earls's observations, and consideration of such subjects presents opportunities to strengthen the effectiveness of the North Carolina judiciary and the public's trust in its integrity and impartiality. Indeed, Justices on the supreme courts of sister states have made similar public comments. In 2020, for example, the then-Chief Justice of the Kentucky Supreme Court emphasized that judges "must be willing to recognize our failures" and constantly evaluate "our own implicit biases." *See infra* p.19. The sharing of such constructive insights by members of a state's highest courts is to be commended, for they can facilitate the improvement of judicial decision making and bolster the public's faith in the judiciary.

Third, the Commissions' action is founded on backwards logic, interpreting constructive comments tending to help bolster judicial integrity as conduct that *fails* to promote public confidence in the integrity of the judiciary. And it overlooks the meaning of "implicit bias" and its workings on the decision making of every human being. By recognizing that judges, like all human beings, have implicit, unconscious biases, Justice Earls was not accusing her colleagues of engaging in any intentionally biased conduct, as the Commission suggests in its letter informing Justice Earls of the investigation. *See infra* p.17.

Below, Amici address the substance of Justice Earls's remarks, and specifically how important it was for her—indeed, for any member of the North Carolina Supreme Court—to cast a spotlight on the disproportionately low number of North Carolina Supreme Court advocates who are Black or women, the disproportionately low number of judicial law clerks who are Black or women, and the disparate treatment of women—be they lawyers

or Justices—as compared to their male colleagues. Were these Justice Earls's unsubstantiated opinions alone, there would still be no basis to institute an investigation into possible disciplinary action against her. That there is, as Amici demonstrate, a wealth of empirical support for her remarks serves to justify the need for her to have spoken out as she has.

Amici also demonstrate below that Justice Earls is not the first justice of a state's highest court—indeed, not the first justice of North Carolina's highest court—to comment in this vein. Yet, to Amici's knowledge, she is the first justice to be subjected to a judicial disciplinary investigation for such remarks.

Finally, amici will demonstrate that, although the Commission's initiation of its investigation into Justice Earls's comments chills her free speech rights, it does not constitute the sort of judicial proceeding that triggers *Younger* abstention. *See Younger v. Harris*, 401 U.S. 37 (1971); *infra* p.23.

The chilling effect on Justice Earls's First Amendment rights is self-evident. Just as devastating are the deleterious impacts on the effectiveness of the judiciary, the long-term potential for jurists to learn and improve, and the public's faith in the justice system. As Justice Earls highlighted in her public comments, by working to address the lack of diversity on the bench and among the advocates before it, the North Carolina judicial system has an opportunity not only to improve its ability and effectiveness, but also to better promote public confidence in its integrity. The voice calling for the judiciary to embrace these opportunities ought not be stifled.

I. Justice Earls Spoke on Matters of Critical Concern to the Judiciary and the People of North Carolina—the Need for the Judiciary to Reflect the State's Diversity and the Effects of Implicit Bias on the Judicial System.

In its letter to Justice Earls, the Commission asserted that Justice Earls's comments "appear to allege that [her] Supreme Court colleagues are acting out of racial, gender, and/or political bias in some of their decision-making." Compl., Ex. A, ECF 1-1. The comments with which the Commission actually takes issue, however, show nothing more than that a member of North Carolina's highest court is aware of the challenges presented by the lack of judicial diversity and by the effects of implicit bias, giving hope that the challenges may be addressed in order to promote the public's confidence in the integrity of the judiciary.

Specifically, in its brief in support of its Motion to Dismiss, the Commission referenced two examples of supposedly improper comments by Justice Earls. *See* Def.'s Br. 9, ECF 21. The first example concerned Justice Earls's response to the journalist's question whether she herself had experienced obstacles that she attributes to her gender or race on her journey to becoming an appellate advocate and Supreme Court judge. Justice Earls said:

> I certainly think that now that I'm on the bench, I see ways in which I'm treated differently by my colleagues and during oral argument, and sometimes it's hard to separate out: Is this race or is this gender or is this because of my political views? Any one of those three or the combination of all three might be the explanation.
>
> I've been interrupted by more junior colleagues and I've had to say, "Excuse me, I'm not finished with my question." And less often or less striking to me, but still occasionally happens is, advocates who won't let me get my question out. That just doesn't happen to my male colleagues.

Compl., Ex. A, ECF 1-2. The second example concerned Justice Earls's response to the journalist's inquiry about efforts being made to diversify the bench. Justice Earls explained that the North Carolina Supreme Court had established a "Commission on Fairness and Equity in the North Carolina judicial system," but that the new Chief Justice had disbanded it, a decision that was "in line with the values of the current party in power in our court. The new members of our court very much see themselves as a conservative bloc. They talk about themselves as 'the conservatives.' Their allegiance is to their ideology, not to the institution." *Id.* Each of these comments elucidated Justice Earls's constructive discussion concerning the need for judicial diversity in North Carolina and the effects of implicit bias.

Justice Earls' comments on implicit bias were inextricably connected with her concern about the lack of judicial diversity. Indeed, her reference to "bias" came in response to the journalist's inquiry into the reasons for the lack of judicial diversity in North Carolina. Asked by the journalist *why* advocates before the North Carolina Supreme Court are "overwhelmingly male and white, despite a diverse state population and state bar membership," Justice Earls thoughtfully observed that the reasons lie in part with a lack of diversity in the "pipeline" of advocates (she noted a lack of racial diversity among law clerks) and in part with the ways implicit bias affects the treatment of female and non-white advocates before the court. Compl., Ex. B, ECF 1-2. To this point Justice Earls said:

> There have been cases where I have felt very uncomfortable on the bench because I feel like my colleagues are unfairly cutting off a female advocate. We have so few people of color argue, but in one case there was a Black woman who argued in front of us and I felt like she was being attacked unfairly, not allowed to answer the question, interrupted. It's not uniform. It's not in every case. And so it could certainly factor in the politics of the particular case that's being argued.

> So when that is the culture of our court — that is to say, when the culture is that male advocates and advocates who reflect the majority of the court, white advocates, when they get more respect, when they are treated better — I think it filters into people's calculations about who should argue and who's likely to get the best reception and who can be the most persuasive.

Id. This treatment of advocates before the Supreme Court, Justice Earls explained, was *not* a function of any "conscious, intentional, racial animus," *id.*, but a result of "implicit biases" that all humans have, including judges. *Id.* "[O]ur court system," she said, "like any other court system, is made up of human beings and I believe the research . . . shows that we all have implicit biases." *Id.*

Examining the lack of racial and gender diversity on the bench, and the effects of implicit bias on the judiciary, is critical to maintaining North Carolinians' faith in the integrity and fairness of the judicial system. Such discussion cannot be regarded as inappropriate for North Carolina jurists; rather it is in harmony with their duty to promote public confidence in the integrity of the judiciary. Indeed, aware as she is of the need for increased diversity on the bench and the potential impacts of implicit bias among advocates and jurists, Justice Earls would do a disservice to the people of North Carolina if she did not speak honestly about unconscious bias, the need for diversity on the bench, and the obstacles to be overcome in achieving it. As discussed below, the comments with which the Commission takes issue spoke directly to these issues, and discussion of such issues promotes public confidence in the integrity of the judiciary.

A. A Lack of Racial Diversity on the Bench Weakens Public Faith in the Fairness of the Judicial System.

The speech for which the North Carolina Judicial Standards Commission targeted Justice Earls concerned a lack of racial and gender diversity in the North Carolina judiciary. *See* Compl., Ex. A, ECF 1-1; Compl., Ex. B, ECF 1-2 (Law360 Interview of Justice Earls). Justice Earls made the public comments in an interview with a journalist concerning the May 2023 findings of a careful study published by the North Carolina Bar Association. Mot. for Prelim. Inj., Ex. B, Decl. of Anita Earls ¶ 6, ECF 3-1. That study found that women and attorneys who are people of color are "starkly underrepresented" among attorneys appearing before the North Carolina Supreme Court, where 72.2% of the advocates are male and 91.5% are white. Ryan Park, et al., *Diversity and the North Carolina Supreme Court: A Look at The Advocates*, North Carolina Bar Association (May 17, 2023), https://www.ncbar.org/nc-lawyer/2023-05/diversity-and-the-north-carolina-supreme-court-a-look-at-the-advocates/. As the study noted: "These figures do not match the demographics of North Carolinians or North Carolina attorneys. . . . [A]lthough women make up a majority of our state's population, barely a quarter of oral advocates at our state's highest court are women. As another example, although nearly a quarter of our state's population is Black, they represent less than 5% of oral advocates at our supreme court (including one advocate who represented himself *pro se*)." *Id.* A Law360 analysis further found that this disparity extends not just to appellate advocates, but to the North Carolina judiciary, as well, where 71% of the North Carolina Supreme Court justices are white

males, and the Court of Appeals judges are 93% white and 60% male. *See* Compl., Ex. B, ECF 1-2.

With such stark disparities in the racial and gender compositions of the bench and bar as compared to those of North Carolinians generally, non-white and non-male litigants understandably may question whether they will have a fair shot before the courts. "This deficit of diversity among judges threatens the legitimacy of the judiciary in the eyes of the communities it serves." Laila Robbins and Alicia Bannon, *State Supreme Court Diversity, Across the Country, Courts Fail to Reflect the Racial, Ethnic, and Gender Diversity of the Communities They Serve*, Brennan Center for Justice, at 2 (July 23, 2019), https://www.brennancenter.org/our-work/research-reports/state-supreme-court-diversity [hereinafter Robbins & Bannon, *State Supreme Court Diversity*]; *see* Sherrilyn A. Ifill, *Judging the Judges: Racial Diversity, Impartiality and Representation on State Trial Courts*, 39 B.C. L. Rev. 95, 101 (1997) ("Moreover, the absence of minority judges on state trial courts contributes to an atmosphere of racial exclusion which, at the very least, marginalizes African American lawyers, litigants and courtroom personnel in many jurisdictions."). All the more so in the context of the American criminal justice system, where one in three Black men are incarcerated in their lifetimes, as compared to one in seventeen white men. Robbins & Bannon, *State Supreme Court Diversity*, *supra* at 2. As a former Ohio Supreme Court Justice has observed, "The public's perception of justice suffers . . . when the only people of color in a courthouse are in handcuffs." *Id.* (*quoting* Yvette McGee Brown, "Foreword," *Building a Diverse Bench: A Guide for Judicial Nominating Commissioners*, Brennan Center for Justice, 2016, 1,

https://www.brennancenter.org/sites/default/files/publications/Building_Diverse_Bench.pdf). Not surprisingly, a 2015 survey on behalf of the National Center for State Courts revealed a "massive racial gap" among perceptions of state judicial systems, revealing "deep distrust of courts among African Americans." GBA Strategies, for National Center for State Courts, *Analysis of National Survey of Registered Voters*, at 4 (November 17, 2015), https://www.ncsc.org/__data/assets/pdf_file/0018/16164/sosc_2015_survey-analysis.pdf.

B. Increasing Judicial Diversity Strengthens the Ability of the Judiciary and Enhances Public Faith in It.

A lack of judicial diversity not only weakens public trust in the judiciary, but also limits the courts' effectiveness. As Justice Thurgood Marshall observed, "if we deprive the legal process of the benefit of differing viewpoints and perspectives on a given problem," we condemn the courts to "one-sided justice." Thurgood Marshall: His Speeches, Writings, Arguments, Opinions, and Reminiscences 243 (Mark V. Tushnet ed., 2001).

Conversely, when the judiciary comprises judges from diverse backgrounds and viewpoints, "[t]he interaction of these diverse viewpoints fosters impartiality by diminishing the possibility that one perspective dominates adjudication." Ifill, *supra* at 99. Likewise, as a Cato Institute author has argued, increasing judicial diversity gives courts "a broader range of expertise and insight for making decisions that require practical judgment and discretion." Jay Schweikert, *Professional Diversity Is Essential for the Supreme Court to Enforce the Constitution*, Cato Institute (March 21, 2022), https://www.cato.org/blog/professional-diversity-essential-supreme-court-enforce-

constitution (focusing on professional diversity and noting that arguments in favor "could apply equally to various forms of demographic diversity, such as race, sex, and religion").

Increasing judicial diversity therefore strengthens the effectiveness of the judiciary. Judges agree. As reported by the Administrative Office of the United States Courts, "judges say that a more diverse workplace makes them better judges in the long run." *See* United States Courts, Judiciary News, *Judges Focus on Diversity in Clerkship, Internship Hiring* (April 29, 2021), https://www.uscourts.gov/news/2021/04/29/judges-focus-diversity-clerkship-internship-hiring. According to Judge Raymond A. Jackson of the Eastern District of Virginia, "Diversity on the bench and among our courtroom and chambers staff is critical to serving a diverse population. . . . It's important that the court is reflective of the community it serves." *Id.* Retired Judge Andre M. Davis of the Fourth Circuit U.S. Court of Appeals has argued, "We are a better and stronger system with diversity on the bench. Having people from different cultural backgrounds changes perceptions and broadens your understanding of the world around you." United States Courts, Judiciary News, *Building Diversity on the Bankruptcy Bench* (Nov. 19, 2019), https://www.uscourts.gov/news/2019/11/19/building-diversity-bankruptcy-bench.

Illustrating Judge Davis's point, in a famous example of a diversity of experience enriching judicial decision making, the United States Supreme Court considered a case involving the strip-search of a 13-year-old girl. "The oral arguments questioned the seriousness of the charge, likening it to locker room situations, and only [Justice] Ginsburg expressed strong concerns. The court voted 8-1 in favor of the girl's suit, and Ginsburg is widely believed to have influenced her colleagues. In an interview with *USA Today*, she

explained, 'they have never been a 13-year-old girl.'" Hannah Hayes, *Diversity on the Bench: Why It Matters in a Polarized Supreme Court*, American Bar Association (Aug. 17, 2022), https://www.americanbar.org/groups/diversity/women/publications/perspectives/2022/august/diversity-the-bench-why-it-matters-a-polarized-supreme-court/; *see Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 368 (2009). "It's a very sensitive age for a girl," she said, "I didn't think that my colleagues, some of them, quite understood." ABC News, *Ginsburg: Court needs another woman* (May 6, 2009), https://abcnews.go.com/Politics/ginsburg-court-woman/story?id=7513795.

In a speech at the University of Virginia where he was being honored with the school's Thomas Jefferson Medal in Law, United States District Judge Carleton Reeves of the Southern District of Mississippi spoke eloquently on the critical need for judicial diversity in furtherance of the judiciary's search for truth and justice. "To find truth, we need all the angles, all distances, all perspectives, what Judge A. Leon Higginbotham called a multitude of different experiences to find the truth. That is what justice requires." Univ. of Virginia Law School, *Judge Carlton Reeves '89 Calls for Justice, Truth and Diversity on the Bench* Tr.7 (2019), https://www.law.virginia.edu/sites/default/files/transcripts/transcript_0.pdf. Noting that "diversity is essential to all kinds of courtroom decision making," Judge Reeves explained that the absence of classes of people from the bench results in decision making that is "exposed to the risk of bias," what Justice Thurgood Marshall called, "one-sided justice." *Id.* Judge Reeves spoke about one-sided justice in his state's history:

> One-sided justice was when Mississippi courts declared that black folk were inferior, that we were personal property, that beating and whipping us was not cruel or unusual. One-sided justice enabled the exclusion, the torture, and sale of black people, enabled the system of slavery that shapes my state's dismal social economic statistics to this day.
>
> This one-sided justice was not exclusive to Mississippi, Virginians had it too, as did the rest of the country. The law of the land was Dred Scott, which said black people were beings of an inferior order, with no rights which the white man was bound to respect. What these decisions reflected was a lack of experience, the black experience, a lack of acknowledgment that black folk also have souls. Without that black experience, courts were led to falsehood.

Id. at 7-8. Such one-side justice manifested itself in the trial of Emmitt Till's murderers, Judge Reeves said, who were served "Mississippi Justice, justice who[se] servants called black folk niggers in open court, justice that ignored black eyewitness testimony, justice that delivered a unanimous not guilty verdict from an all white, all-male jury that deliberated for . . . an hour and seven minutes. Why that long? Because they took a pop break. Mississippi justice show[s] the world what courts look like when twisted by the falsehood of hate, deprived of the experiences of those they serve." *Id.* at 9.

In addition to enhancing the judiciary's effectiveness, increasing judicial diversity promotes public trust and confidence in the judiciary. *See* Robbins & Bannon, *State Supreme Court Diversity* at 2 & n.8 (citing Nancy Scherer and Brett Curry, *Does Descriptive Race Representation Enhance Institutional Legitimacy? The Case of the U.S. Courts*, The Journal of Politics 72 (2010) (discussing research into the federal courts showing that "greater descriptive representation for blacks causes increased legitimacy for the institution among African Americans")). Former Georgia Supreme Court Chief Justice Leah Ward Sears has publicly argued that a more diverse court enhances the court's

legitimacy. *See* Lisa Hagen, *Hopes for Diversity as Ga. Supreme Court Expands*, WABE.org (Aug. 3, 2016), https://www.wabe.org/former-chief-justice-hopes-diversity-ga-supreme-court-expands/. Chief Justice Sears recognized that a supreme court often declares the law of the land. When doing so, "it's necessary to get a whole host of different perspectives, and one group of people can't provide those different perspectives," she said. *Id.*

II. Justice Earls Discussed Implicit Bias and Her Experiences with Her Fellow Jurists in Addressing the Causes and Effects of the Lack of Judicial Diversity.

As is clear from the text of the article reporting on Justice Earls's interview, Justice Earls's comments about implicit bias and her experiences with her colleagues on the bench informed the interview concerning the lack of judicial diversity, and it is only in that larger context that her comments can fairly be viewed. Implicit bias is, in her opinion, both the cause and effect of this serious problem. On the one hand, that the majority of advocates and Supreme Court clerks are white men may unconsciously affect how women and women of color in particular are treated. On the other hand, it is part of a cycle that perpetuates white male hegemony on the bench and among appellate advocates.

Justice Earls is right on the facts that the research shows that all humans, judges included, have implicit, unconscious biases that affect their decision making. Reporting on the results of one of the first rigorous studies of the potential effects of implicit bias in judicial decision making, a set of professors from Vanderbilt and Cornell law schools, and a federal magistrate judge, found in 2009 that "judges harbor the same kinds of implicit biases as others; that these biases can influence their judgment; but that given sufficient

motivation, judges can compensate for the influence of these biases." Jeffrey A. Rachlinkski, et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 Notre Dame L. Rev. 1195, 1195 (2009). "Implicit biases," the authors explained, referred to "stereotypical associations so subtle that people who hold them might not even be aware of them[.]" *Id.* at 1196; *see* Pamela M. Casey, et al., *Helping Courts Address Implicit Bias*, National Center for State Courts, at 1-2 (2012), http://ncsc.contentdm.oclc.org/cdm/ref/collection/accessfair/id/246 ("Implicit, as opposed to explicit, attitudes and stereotypes operate automatically, without awareness, intent, or conscious control. Because they are automatic, working behind-the-scenes, they can influence or bias decisions and behaviors, both positively and negatively, without an individual's awareness."); Jerry Kang, Judge Mark Bennett, et. al., *Implicit Bias in the Courtroom*, 59 UCLA L. Rev. 1124, 1126 (2012) (implicit biases are "attitudes or stereotypes that affect our understanding, decisionmaking, and behavior, without our even realizing it").

Significantly, the authors of the 2009 study found that judges can learn to correct for implicit biases through training and education that "reveal[s] the vulnerabilities of the judges" to implicit bias. Rachlinkski, *supra*, at 1198. In her public comments on judicial diversity, Justice Earls discussed the importance of such training and the potential for it to ameliorate the effects of implicit bias in the judiciary. Compl., Ex. B, ECF 1-2. A review of court decisions expressing awareness of implicit bias shows that courts' familiarity with it better informs their decisions. *See* Arusha Gordon and Ezra D. Rosenberg, *Barriers to the Ballot Box: Implicit Bias and Voting Rights in the 21st Century*, 21 Mich. J. of Race

and Law 23, 42-46 (2015). To that end, the National Center for State Courts (NCSC) issued a report suggesting data-driven methods of addressing implicit bias, and Justice Earls' comments comport with NCSC's recommendations: rather than try to change how we all think, we should openly identify when bias affects our behavior so we can insulate the result—here, judicial decision-making—from the bias that affects us all. *See* National Center for State Courts, *The Evolving Science of Implicit Bias: An Updated Resource for the State Court Community* 15-16 (2021), https://ncsc.contentdm.oclc.org/digital/collection/accessfair/id/911. Rooting out implicit bias in our courts is a moral imperative because it cements primacy of the law and judicial even-handedness over pervasive implicit bias, explicit bias, and the changing political winds. *See* Schweikert, *supra* ("It's unwise and unreasonable to expect the Court to fairly and effectively craft doctrines for vast domains of law when the Justices' own experiences in these domains are either one-sided or non-existent").

Research also corroborates Justice Earls's first-hand observations that jurists treat advocates and female jurists differently based on their gender, even if unintentionally. Analyzing over 3,500 oral arguments before the United States Supreme Court, professors from the University of Alabama found that female advocates before the Supreme Court were not only "interrupted earlier" than male advocates, but they were also "allowed to speak for less time between interruptions," while being "subjected to more and longer speeches by the justices." Dana Patton and Joseph Smith, *Lawyer, Interrupted: Gender Bias in Oral Argument at the U.S. Supreme Court*, 5 J. of Law and Cts., 337, 338 (2017). Neither are female justices immune to interruption. A 2017 report found that women on the

Court received 54% of overall interruptions, despite comprising a historical average of between 11% and 33% of the bench. Tonja Jacobi and Dylan Schweers, *Justice, Interrupted: The Effect of Gender, Ideology, and Seniority at Supreme Court Oral Arguments*, 103 Va. L. Rev. 1379, 1466 (2017). Furthermore, despite the Court's response to the 2017 report, female justices were still interrupted 2.23 times as much as their male colleagues in 2021. Tonja Jacobi and Matthew Sag, *Supreme Court Interruptions and Interventions: The Changing Role of the Chief Justice*, B.U. L. Rev. (forthcoming 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4381566.

As did Justice Earls, former United States Supreme Court Justice Ruth Bader Ginsburg spoke publicly about her observations concerning her Supreme Court colleagues' disparate treatment of female jurists. In an interview with *USA Today*, for example, Justice Ginsburg stated publicly that her male colleagues often do not focus on a point she makes in conference with them until another male Justice makes the same point. *See* Mary Kate Cary, *Ruth Bader Ginsburg's Experience Shows the Supreme Court Needs More Women*, U.S. News (May 20, 2009), https://www.usnews.com/opinion/blogs/mary-kate-cary/2009/05/20/ruth-bader-ginsburgs-experience-shows-the-supreme-court-needs-more-women. This behavior matched her experience with male attorney colleagues in the decades before she joined the bench, and it continued during her 16 years as a Justice before she gave the interview in 2009. *Id.*

Notwithstanding the objective research on implicit bias, its effect on judicial decision making, and its definition as unconscious and unintentional, the Commission found that Justice Earls's comments "appear to allege that your Supreme Court colleagues

are acting out of racial, gender, and/or political bias in some of their decision-making," and that Justice Earls's comments therefore "potentially violate[] Canon 2A of the Code of Judicial Conduct which requires a judge to conduct herself 'at all times in a manner which promotes public confidence in the integrity and impartiality of the judiciary.'" Compl., Ex. A, ECF 1-1.

The Commission misapplies Canon 2A of the Code of Judicial Conduct. Justice Earls's public acknowledgment of implicit bias in the judiciary promotes, by its candor, public confidence in the judiciary's even-handedness and integrity. The effect of such comments by a member of North Carolina's highest court is profoundly beneficial: those of us affected by such bias regain trust in the justice system, and all of us, including judges, are given the lease to resolve the bias we unknowingly carry without fear of being misunderstood. The Commission's investigation undoes this salutary effect.

What is more, the Commission fails to see the uniquely valuable insight that Justice Earls's professional and personal experience provides. Justice Earls began developing civil rights expertise immediately after her graduation from Yale Law School in 1988. In the 1990s, she was Deputy Assistant Attorney General in the Civil Rights Division of the United States Department of Justice. She directed the Voting Rights Project at the Lawyers' Committee for Civil Rights Under Law and later founded the Southern Coalition for Social Justice. Aside from her professional experience, an understanding of bias and its effects imbued her childhood home, as she grew up knowing that her parents, an interracial couple, had moved out of Missouri to escape laws outlawing interracial marriage. Judicial Directory: Anita Earls, North Carolina Judicial Branch, (last visited Sept. 13, 2023, 10:48

AM), https://www.nccourts.gov/judicial-directory/anita-earls. These experiences, as well as her position as the only Black member of the North Carolina Supreme Court, informed her public comments. In light of her background and experience, her perspective on the potential for increased diversity to strengthen the North Carolina justice system, and on the role that implicit bias plays among judges and advocates, is invaluable to the people of North Carolina.

Justice Earls's statements on implicit bias in the judiciary do not stand alone. In June 2020, Chief Justice John D. Minton of the Kentucky Supreme Court made the same assertion: "As a justice system, we must be willing to recognize our failures. . . . We must continue to improve communication between the courts, justice partners, and court participants. And we must constantly evaluate and address institutional racism and our own implicit biases. I recognize that we—all of us—have a long way to go." National Center for State Courts, *State court statements on racial justice*: *Kentucky* (*quoting* Chief Justice John D. Minton Jr., June 4, 2020), https://www.ncsc.org/consulting-and-research/areas-of-expertise/racial-justice/state-activities/state-court-statements-on-racial-justice. Indiana Supreme Court Chief Justice Loretta Rush acknowledged the same judicial responsibility, saying that it, "may be hard to hear for all of us who work every day for fairness, but we must . . . confront the reality that our fellow community members say is their experience." Chief Justice Loretta H. Rush, Supreme Court of Indiana, *Statement on Race and Equity* (June 5, 2020), https://www.in.gov/courts/files/rush-statement-race-equity.pdf. Indeed, the former Chief Justice of the North Carolina Supreme Court Cheri Beasley said the same: "As the mother of twin sons who are young black men, I know that the calls for change

absolutely must be heeded. . . . [W]e must also acknowledge the distinct role that our courts play. As Chief Justice, it is my responsibility to take ownership of the way our courts administer justice, and acknowledge that we must do better, we must be better." Press Release, North Carolina Judicial Branch, *Chief Justice Beasley Addresses the Intersection of Justice and Protests Around the State* (June 2, 2020), https://www.nccourts.gov/news/tag/press-release/chief-justice-beasley-addresses-the-intersection-of-justice-and-protests-around-the-state.

As far as Amici are aware, none of these jurists was subjected to an investigation by their respective states' judicial ethics commissions, and for good reason. More than most, judges have well-informed insights on the workings of the justice system, and their perspectives are therefore vital to the public on issues concerning the administration of justice. *See Scott v. Flowers*, 910 F.2d 201, 211 (5th Cir. 1990) (holding that county judge's public comments about the administration of justice in his county were protected by the First Amendment in part because "as an elected judge from that county, [the judge] was likely to have well-informed opinions"). As the Fifth Circuit noted in *Scott*, the goals of "promoting an efficient and impartial judiciary" are "ill served by casting a cloak of secrecy around the operations of the courts," and a judge's "bringing to light an alleged unfairness in the judicial system" furthers such goals. *Id.* at 213; *accord* Jerry Kang, Judge Mark Bennett, et al., *Implicit Bias in the Courtroom*, 59 UCLA L. Rev. 1124, 1179 (2012) ("It may be difficult to correct biases even when we do know about them, but it is virtually impossible to correct them if they remain invisible.")

Justice Earls's comments on the need for judicial diversity; the impact of implicit bias on diversity, advocates, and jurists like herself; and the North Carolina Supreme Court's recent decision to disband a committee that would have addressed the lack of judicial diversity brought those issues to light, facilitating public awareness of those areas in which the North Carolina judicial system could improve. Moreover, concerning Justice Earls's observation that the decision to disband the commission that would have addressed the lack of judicial diversity was consistent with the new justice's values and that those justice's allegiance was to their ideology and not the institution, it is clear that the comment concerns the administrative decision to disband the commission, not the justices' decisions on the cases before them.

III. The Commission's Action Disserves the Interest in Promoting Public Confidence in the Integrity and Impartiality of the Judiciary.

"A State may restrict the speech of a judicial candidate only if the restriction is narrowly tailored to serve a compelling state interest." *Williams-Yulee v. Florida Bar*, 575 U.S. 433, 444 (2015). While in *Williams-Yulee*, the Court found the restriction there—a prohibition against judicial candidates personally soliciting campaign funds—to be "one of the rare cases in which a speech restriction withstands strict scrutiny," *id.* at 445, the instant case is hardly such a rarity. Indeed, it is closer—and more egregious—than the case reaffirmed in *Williams-Yulee*, *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002). In *White*, the Supreme Court held that a state canon of judicial conduct that prohibited a candidate for judicial office or a sitting judge from announcing their views

"on disputed legal or political issues" violated the First Amendment, on the grounds that it was not narrowly tailored to serve the purported interest of judicial impartiality.

Here, the Commission's action is not tailored at all to the interest it asserts, but rather *disserves* that interest. In its letter to Justice Earls, the Commission asserts that it is investigating her comments because they "suggest that another judge before whom litigants are appearing is making decisions based on some improper basis," and that such comments run counter to the requirement of Canon 2A of the Code of Judicial Conduct for "a judge to conduct herself 'at all times in a manner which promotes public confidence in the integrity and impartiality of the judiciary.'" Compl., Ex. A, ECF 1-1. If promoting confidence in the integrity and impartiality of the judiciary is the Commission's interest, censoring evidence-based speech informing the public of the influence of implicit, unconscious bias on judicial decision making does not serve that interest. Rather, as discussed above, for a Supreme Court Justice to acknowledge that implicit bias affects judges, as it affects all humans, *strengthens* confidence in the judiciary because awareness of such fallibility is a necessary pre-condition to the judiciary taking action to address it. "If judges are educated as to the implications of a lack of public confidence and their tendencies to under-correct their own implicit biases, they may choose to address the concerns of the people and restore faith in the system." Asha Amin, *Implicit Bias in the Courtroom and the Need for Reform*, 30 Geo. J. Legal Ethics 575, 591 (2017).

In contrast, censoring such comments, indeed investigating judges for acknowledging imperfections in the justice system, disserves the interest that the Commission purportedly seeks to advance—promoting public confidence in the integrity

and impartiality of the judiciary—because it signals that the judiciary will act to suppress public awareness of such imperfections rather than working to address them.

IV. The Commission's Investigation is not the Type of Proceeding that Warrants *Younger* Abstention.

The Commission's investigation of Justice Earls is not the type of state proceeding triggering *Younger* abstention. Emphasizing that "a federal court's 'obligation' to hear and decide a case is 'virtually unflagging,'" *Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69, 77 (2013), the Supreme Court has recognized only three types of proceedings warranting *Younger* abstention, among them "certain 'civil enforcement proceedings'" that are "'akin to a criminal prosecution' in 'important respects.'" *Id.* at 78-79. The Commission argues that its investigation of Justice Earls falls into this category, and that the Supreme Court's decision in *Middlesex County Ethics Comm. v. Garden State Bar Association* "forecloses any debate" on the matter. Def.'s Br. 13, ECF 21 (citing *Middlesex Cnty*, 457 U.S. 423 (1982)). It does not, and the Commission is mistaken.

Civil enforcement actions warranting *Younger* abstention "are characteristically initiated to sanction the federal plaintiff, i.e., the party challenging the state action, for some wrongful act." *Jacobs*, 571 U.S. at 79. This is not the function of the Commission's operations. As the North Carolina Supreme Court repeatedly has stated regarding the Commission, "Its aim is not to punish the individual but to maintain the honor and dignity of the judiciary and the proper administration of justice." *In re Nowell*, 293 N.C. 235, 241 (1977); *see In re Inquiry Concerning a Judge, Nos. 270 & 280 Hill, Respondent*, 357 N.C. 559, 564 (2003) (same). Moreover, whereas it was important to the Supreme Court in

Middlesex County that the New Jersey Supreme Court regarded disciplinary proceedings of the ethics committee as "judicial in nature," 457 U.S. at 433-34, the North Carolina Supreme Court has made clear that the Commission's operations are not. "[A] proceeding begun before the Commission is neither a civil nor a criminal action. Such a proceeding is *merely an inquiry* into the conduct of one exercising judicial power to determine whether he is unfit to hold a judgeship." *In re Nowell*, 293 N.C. at 241 (citations omitted) (emphasis added). Indeed, unlike the New Jersey disciplinary proceedings at issue in *Middlesex County*, which could result in final disciplinary decisions subject only to appellate-type review by the New Jersey Supreme Court, much like a judicial tribunal, *see Middlesex County*, 457 U.S. at 427, the Commission has no such authority. Rather, "the Commission can neither censure nor remove a judge. It is *an administrative agency* created as an arm of the court to conduct hearings for the purpose of aiding the Supreme Court in determining whether a judge is unfit or unsuitable." *In re Nowell*, 293 N.C. at 244. In North Carolina, unlike in New Jersey, the North Carolina Supreme Court "acts as a court of original jurisdiction" in reviewing the Commission's recommendations, "rather than in its usual capacity as an appellate court." *In re Inquiry Concerning a Judge*, 357 N.C. at 564. The Supreme Court "consider[s] the evidence and then exercise[s] independent judgment as to whether to censure, to remove, or to decline to do either." *Id.*

Younger abstention is limited to matters involving "an ongoing state judicial proceeding." *Courthouse News Serv. v. Schaefer*, 2 F.4th 318, 324 (4th Cir. 2021). "Absent any pending proceeding in state tribunals" application of *Younger* abstention is "clearly erroneous." *Ankenbrandt v. Richards*, 504 U.S. 689, 705 (1992). In light of the

Commission's lack of decisional authority, and in view of the North Carolina Supreme Court's emphasis that "a proceeding begun before the Commission is neither a civil nor a criminal action," *In re Nowell*, 293 N.C. at 241, and that the Commission is simply "an administrative agency," *id.* at 244, the Commission's investigation of Justice Earls is properly regarded not as akin to a criminal enforcement proceeding, but as the workings of a non-judicial, pre-decisional "administrative agency." While the Commission's investigation certainly adversely impacts Justice Earls's ability to exercise her First Amendment rights, it is not a judicial proceeding that warrants application of *Younger* abstention. *See Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 233-34, 238-39 (1984) (*Younger* abstention did not block action against state housing authority where the agency had the power to hold hearings and make findings as to whether certain private land parcels should be designated for sale, but where a separate court proceeding was necessary to actually order the condemnation and sale pursuant to eminent domain, and those separate proceedings had not begun). *See also Google, Inc. v. Hood*, 822 F.3d 212, 223 (5th Cir. 2016) (state agency proceedings did not warrant *Younger* abstention where the agency had not already "investigated the allegations, made determinations that probable cause existed, and served formal charges").

"[A]bstention from the exercise of federal jurisdiction is the 'exception, not the rule.'" *Jacobs*, 571 U.S. at 82. "*Younger* does not apply merely because 'a state bureaucracy has initiated contact with a putative federal plaintiff' or 'a state investigation has begun.'" *Hood*, 822, F.3d at 223 (internal citations omitted). Here, holding that the Commission's proceedings warrant *Younger* abstention would expand the types of proceedings to which

the doctrine applies beyond those sanctioned by the Supreme Court in *Jacobs* and in contravention of this Court's "virtually unflagging" obligation to hear and decide the case before it." *Jacobs*, 571 U.S. at 77.

CONCLUSION

That Justice Earls would be subjected to an investigation for extrajudicial statements discussing the need for increased diversity in our judicial system should raise the gravest concerns as to whether her constitutional rights are being violated. The Commission's investigation chills Justice Earls's speech, as she recounts, and in so doing deprives North Carolinians of a uniquely valuable perspective concerning the quality of their judiciary and opportunities for it to improve. In so doing, the Commission hinders the potential for the judiciary to become more effective and to address a shortcoming—a lack of judicial diversity—that undermines the public's trust in the judiciary. By facilitating potential improvement in the judiciary's effectiveness and the public's trust in its capacity to render justice, Justice Earls's public comments accomplish the very thing that the Commission accuses her of failing to do: "promot[ing] public confidence in the integrity and impartiality of the judiciary.'" *See* Compl., Ex. A, ECF 1-1. It is the Commission's ill-conceived investigation, by stifling constructive criticism of the judiciary from one of the North Carolinians who knows it best, that risks damaging the judiciary and the public's faith in its ability to do justice.

This 20th day of October 2023.

/s/ Mark Dorosin
Mark Dorosin

NC Bar # 20935
FLORIDA A&M UNIVERSITY COLLEGE OF LAW
201 FAMU Law Lane
Orlando, FL 32801
407-254-4043
mark.dorosin@famu.edu

Jon M. Greenbaum, DC Bar No. 489887
Edward G. Caspar, DC Bar No. 1644168
Ezra D. Rosenberg, DC Bar No. 360927
LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW
1500 K St. NW, Suite 900
Washington, DC 20005
(202) 662-8390
jgreenbaum@lawyerscommittee.org
ecaspar@lawyerscommittee.org
erosenberg@lawyerscommittee.org

Counsel for Movants

CERTIFICATE OF SERVICE

I certify that the foregoing filing is being served on all parties of record by the Court's ECF system on the date of filing, this 20th day of October 2023.

/s/ Mark Dorosin
Mark Dorosin